

IN THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT IN AND FOR
UTAH COUNTY, STATE OF UTAH

PROVO RESERVOIR COMPANY, a	:	
corporation,	:	
	:	NO. 2888 CIVIL
Plaintiff,	:	
	:	ANSWER OF UTAH POWER & LIGHT COMPANY
vs.	:	TO AMENDED PETITION OF PROVO RESERVOIR
	:	WATER USERS COMPANY
PROVO CITY, et al.,	:	
T. F. WENTZ,	:	
	:	
Defendants	:	

COMES NOW Utah Power & Light Company, one of the Defendants in the above named case, and by leave of court first had and obtained, files the following answer to the amended petition of Provo Water Users Company on file herein, and for answer to said petition said Utah Power & Light Company admits, denies and alleges as follows:

1.

Answering paragraphs 1, 2, 3 and 4 of said amended petition, said Utah Power & Light Company, hereinafter referred to as this Defendant, admits each and every allegation contained in said paragraphs.

2.

Answering paragraph 5 of said petition, this Defendant denies that it has knowledge or information sufficient to form a belief concerning the matters and allegations set forth in the first paragraph of said paragraph 5 relating to Petitioner's storage rights and water applications pertaining thereto and the contents of said applications, and therefore denies the same. This Defendant admits that the distance between Petitioner's reservoirs and Heiselt's Dam is approximately 70 miles.

Further answering paragraph 5 of said petition this Defendant admits that the decree in this cause (No. 2888 Civil) contains paragraphs numbered 120, 117 and 118, as set forth in said petition.

With reference to paragraph 118, however, this Defendant alleges and shows to the court that said decree was appealed to the Supreme Court

of Utah (Supreme Court Case No. 3741) and said decree upon appeal was modified by order of said Supreme Court dated June 12, 1922, by the ordering and entering by said Supreme Court of a supplemental decree which contains, among other things, the following paragraph :

It is further ordered, adjudged and decreed, that whenever the quantity of Class "A" water, as hereinbefore awarded and decreed to the plaintiff and the several defendants, is insufficient to supply the full quantity of said class, then, excepting the waters for domestic and municipal uses of Provo City as set out in subdivision (e) paragraph 4, and the waters of the Utah Power & Light Company as set out in paragraph 33 of the Decree entered herein on the 2nd day of May, A.D. 1921; the plaintiff and the several defendants entitled thereto shall have the water distributed to them pro rata in proportion to the quantities severally awarded to them in said decree in said class, for each of the irrigation periods mentioned therein.

3.

Answering the allegations contained in paragraph 6 of said petition, this Defendant denies that said decree was not appealed from or modified, and alleges that said decree was appealed from and modified as hereinabove set forth. Further answering said paragraph 6, this Defendant admits the allegations therein contained, except as hereinabove denied and qualified.

4.

Answering paragraph 7 of said petition, this Defendant denies each and every allegation therein contained.

5.

Answering paragraph 8, this Defendant admits that since on or about July 4, 1935, Petitioner has released certain waters from storage reservoirs at the head of the Provo River System, the exact quantity of which released waters is to this Defendant unknown. Further answering said paragraph 8, this Defendant denies that it has information or knowledge sufficient to form a belief as to the allegations contained in said paragraph 8 except as aforesaid, and on that ground denies each and every allegation therein contained not hereinbefore specifically admitted.

6.

Answering paragraph 9, this Defendant admits that at all times since July 5, 1935, there has been and is now a flow of water at Defendant's

power (Olmsted) dam on Provo River in excess of 60 cubic feet per second. This Defendant denies each and every allegation in said paragraph 9 contained, except as hereinabove specifically admitted, and this Defendant specifically denies that there is a sufficient flow of Petitioner's storage water, or of any water to which Petitioner is entitled, to supply said Petitioner the same volume of water which Petitioner is releasing from its reservoirs less 4 percent.

7.

Answering paragraph 10 of said Petition, this Defendant denies each and every allegation in said paragraph 10 contained.

8.

Answering paragraph 11, this Defendant denies each and every allegation in said paragraph contained.

9.

Answering paragraph 12, this Defendant denies each and every allegation in said paragraph contained.

10.

Answering paragraph 13, this Defendant denies each and every allegation in said paragraph contained.

11.

Answering paragraph 14, this Defendant denies that it has either knowledge or information sufficient to form a belief as to the allegations in said paragraph 14 contained and therefore denies the same.

12.

Further answering said Petition, this Defendant generally denies each and every allegation contained in said Petition, and in the whole thereof, except as hereinbefore specifically admitted or qualified.

Further answering said petition, and also as an affirmative defense thereto, this defendant alleges:

13.

That it is a corporation duly qualified and doing business as an electrical public utility in the State of Utah, and owns and operates various power plants therein, including its Olmsted hydro-electric generating plant on Provo River, which said plant is supplied with water by means of its flume or pipeline and its diverting dam on said Provo River, known as the Olmsted dam, which dam is located a short distance upstream or above Petitioner's Heiselt dam in said petition referred to.

14.

That certain of this defendant's water rights on and in Provo River are set forth in the Provo River decree heretofore entered in this cause (No. 2888 Civil) in paragraph 33 thereof, which provides in part as follows:

" -33-

Utah Power & Light Company.

From January 1st to December 31st of each and every year.

- (a) The Utah Power & Light Company, as the successor in interest to the rights of the Telluride Power Company, and the Telluride Power & Transmission Company, has the right to divert from Provo River by its dam built across said river in section 34, township 5 south, range 3 east, Salt Lake Base and Meridian, and convey through its flume and pipeline extending from said dam to its power generating station situated in the northeast quarter of Section 7, township 6 south, range 3 east, Salt Lake Base and Meridian at or near the mouth of Provo Canyon in Utah County, Utah, 229 second feet of water, to be used for the generation of power. The said defendant, the Utah Power & Light Company, in order to divert and use said quantity of water, has the right and is entitled to divert and use all of the flow of said river at said dam and diversion works as now located, except the storage water, the waters diverted from the Weber River, hereinafter set out, tunnel water, and transferred water rights that have the right to pass said dam, at any stage of flow at or below the quantity above specified, and in making such diversion of said waters, the said defendant has the right to reconstruct or improve said dam or to build a new dam at the present location of said dam.

* * * * *

- (e) Of the flowing waters from the mouth of the "Ontario Drain Tunnel" in Wasatch County, Utah, one-half thereof; after deducting five and one-half second feet, that is:

Further answering said petition, and also as an affirmative defense thereto, this defendant alleges:

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* * * * *

- (e) Of the flowing waters from the mouth of the "Ontario Drain Tunnel" in Wasatch County, Utah, one-half thereof; after deducting five and one-half second feet, that is:

Flow from Ontario Drain Tunnel - 5.5 second feet

2

and has the right to comingle the same with the waters of

Provo River and use for the generation of power and for other purposes, or to use for the generation of power and lease or grant the use of the same for irrigation and other beneficial purposes."

Petitioner also refers to a portion of paragraph 124 of said decree, which provides as follows:

"That all the rights declared and decreed herein, for domestic and municipal uses and for the generation of power, are continuous throughout the year without limitation to time or season."

and also to the paragraph, hereinabove quoted, by which said decree was modified upon appeal to the Supreme Court of Utah, as follows:

"It is further ordered, adjudged and decreed, that whenever the quantity of Class "A" water, as hereinbefore awarded and decreed to the plaintiff and the several defendants, is insufficient to supply the full quantity of said class, then, excepting the waters for domestic and municipal uses of Provo City as set out in subdivision (e) paragraph 4, and the waters of the Utah Power & Light Company as set out in paragraph 33 of the Decree entered herein on the 2nd day of May, A.D. 1921; the plaintiff and the several defendants entitled thereto shall have the water distributed to them pro rata in proportion to the quantities severally awarded to them in said decree in said class, for each of the irrigation periods mentioned therein."

15.

That this defendant is informed and believes and therefore alleges that since about July 4, 1935, petitioner has released and is now releasing certain stored waters from certain reservoirs located in the headwater regions of the Provo River System, which said reservoirs are approximately 70 miles upstream or above said Heiselt dam, and which said waters have been and are now being released into the channel of certain of the tributaries of said Provo River, for the purpose of being transmitted down and through said River and river system to petitioner's said Heiselt dam.

16.

With reference to said released waters, and petitioner's alleged rights in connection therewith, this defendant refers to paragraphs 117 and 120 of said Provo River decree which provide as follows:

"-117-

It is further ordered, adjudged and decreed, that the storage waters, the Ontario Drain Tunnel waters, and the waters diverted from the Weber River watershed, turned into and comingled with the waters of Provo River, shall bear each its respective loss by evaporation and seepage, and

shall bear each its respective proportion of the cost of distribution and administration of the orders of the Court and the Decree herein, and;

The final determination and fixing of the quantity of water that should be deducted for loss in transmission of the stored waters, the Ontario Drain Tunnel waters, and the waters diverted from the Weber River watershed, turned into and comingled with the waters of the Provo River, is postponed until such time as observations and measurements will enable the Court to fix the same with reasonable certainty. The Court will therefore retain jurisdiction of this case for that purpose and at some future time, upon application of any party interested therein, will hear such evidence as may be available, and determine the amount of loss in transmission of such water. Pending such hearing and determination there may be deducted from the stored waters, four per cent of their volume, for loss by evaporation and seepage.

That the Commissioner shall determine, when practicable, the quantity of loss by evaporation and seepage, of the waters in this paragraph referred to."

"-120-

It is further ordered, adjudged and decreed, that the plaintiff and the defendants having the right to store water in their several reservoirs, as hereinbefore stated, have the right to release said waters in the quantities and at such times as they may elect, and to comingle the same with the waters of Provo River, and then be taken out less the losses by evaporation and seepage."

17.

That said released waters pass down and along the channels of said Provo River system a distance of approximately 45 miles to what is commonly known and called the Upper Midway dam. And this defendant is informed and believes and therefore alleges that during said passage said released waters suffer a loss from seepage and evaporation greatly in excess of 4% of the original amount released, the exact amount of which loss is to this defendant unknown.

18.

This defendant is informed and believes and therefore alleges that at said Upper Midway dam the rights of various water users require, at the present time, that all of the natural flow in said Provo River be diverted therefrom for the use of said water users, and that the only water which the Commissioner, T. F. Wentz, permits to pass by and over said dam is the released waters hereinabove referred to, together with certain

Ontario Drain Tunnel water belonging to this defendant under and by virtue of the provisions of paragraph 33 hereinabove set forth. And defendant further alleges, on information and belief, that in spite of the losses actually occurring to said released waters as hereinabove alleged, and in spite of the fact that said losses greatly exceed 4 percent of the original volume of said released waters, said Commissioner has never, at any time, deducted more than 4 percent of the original volume of said released waters to compensate for said losses by seepage and evaporation.

19.

Petitioner further alleges, on information and belief, that the only waters which said Commissioner is, at the present time, permitting to by-pass and flow beyond said Upper Midway Dam are the Ontario waters of this defendant and the released storage waters aforesaid, and that the volume of released water actually flowing over and past said dam is the same volume less 4 percent as was originally released from the storage reservoirs hereinabove referred to; in other words, said Commissioner is deducting 4 percent of the original volume of said released waters, at the place aforesaid, for loss by evaporation and seepage.

20.

Defendant further alleges, on information and belief, that the only waters flowing in the channel of said Provo River between said Upper Midway dam and what is known as the Mill Dam, a distance along said channel of approximately $1\frac{1}{2}$ miles, are the waters which said Commissioner passes and is now passing over said Upper Midway dam as aforesaid, namely--the released storage waters and Ontario waters as hereinabove alleged; and that there is no other water whatsoever, either natural flow or otherwise, in said River channel along said $1\frac{1}{2}$ -mile stretch thereof. And petitioner further alleges, on information and belief, that neither said Commissioner nor any other person diverts any water whatsoever from said $1\frac{1}{2}$ -mile stretch of river channel, and that no water whatsoever is diverted therefrom.

21.

Defendant further alleges, on information and belief, that of the waters which flow and have flowed past said Upper Midway Dam since July 5,

1935, as aforesaid, a portion thereof is and has been lost by evaporation, and a great and large quantity thereof is and has continuously been lost by seepage and by sinking into the ground and bed of said river channel along the $1\frac{1}{2}$ -mile stretch aforesaid, and defendant alleges that from 25 percent to 40 percent of the volume of water passing over said Upper Midway dam is and has been lost before the balance of said water reaches said Mill Dam approximately $1\frac{1}{2}$ miles below.

22.

By way of exemplifying the allegations in the preceding paragraph, defendant alleges, on information and belief, that on August 18, 1935, the sole and only waters passing over and beyond said Upper Midway Dam were Ontario and released storage waters in the quantity or volume of approximately 27.26 cubic feet per second; that of said waters, only 16.86 cubic feet per second thereof reached said Mill Dam; and that a volume and quantity equal to 10.40 cubic feet per second of said waters, or approximately 37 percent thereof, was lost by evaporation and seepage during transit through and over the $1\frac{1}{2}$ -mile stretch aforesaid.

23.

Defendant further alleges, on information and belief, that in spite of the matters and particularly the water losses alleged in the last two preceding paragraphs, said Commissioner has never, at any time, made any deduction whatsoever for said losses, and has at all times given and is now giving petitioner and this defendant full credit for the actual quantity and volume of water arriving at said Mill Dam as aforesaid.

24.

Defendant further alleges that a short distance below the said Mill Dam there is located a dam known as the Lower Midway dam; and defendant alleges, on information and belief, that said Commissioner, at said Lower Midway dam, measures and determines the volume and quantity of Ontario and storage waters which arrives at said Lower Midway dam, and further determines what proportion thereof is petitioner's storage water and

what proportion thereof is the Ontario Drain Tunnel water of this defendant. Defendant further alleges that said Lower Midway dam is approximately 20 - 25 miles above or upstream from petitioner's Heiselt dam where petitioner diverts its said released storage waters from the Provo River for the use of petitioner's members or stockholders. And defendant further alleges, on information and belief, that at all times since July 5, 1935, said Commissioner T. F. Wentz has delivered and is now delivering to petitioner at its said Heiselt dam a quantity and volume of water identical with the quantity and volume of petitioner's released waters which arrive at said Lower Midway dam as aforesaid, without any deduction whatsoever for losses in transit over said 20-25 miles between said Lower Midway dam and petitioner's Heiselt dam aforesaid.

25.

Defendant further alleges that its said water rights set forth in paragraph 33 of said Provo River decree, as above quoted in paragraph 14 of this answer, are what are known as "Class A" rights which have a priority earlier than May 12, 1903; that petitioner's alleged storage rights as set forth in paragraph 4 of petitioner's amended petition herein, and as set forth in paragraphs 38 and 42 of said Provo River decree, are a "Class B" right which has a priority of not earlier than August 22, 1905, and a "Class F" right which has a priority of not earlier than September 15, 1908, respectively.

26.

Defendant further alleges that to give to petitioner at its said Heiselt dam a quantity and volume of water equal to the quantity released by petitioner from said storage reservoirs, less 4 percent, as prayed for by petitioner, would require that "Class A" water decreed to this defendant and other "Class A" users as aforesaid, and which this defendant is entitled to divert and is diverting at its said Olmsted dam and using through its said Olmsted powerhouse for the generation of electrical power and energy, be passed by said Olmsted dam, and the same would deprive this defendant of said waters and the use thereof, and would deprive defendant of valuable property and vested property rights without due process of law and without

compensation, in violation of rights guaranteed to this defendant under the constitutions of the State of Utah and of the United States of America, and also in violation of the decreed and vested rights of this defendant under said Provo River decree. And defendant alleges that the total quantity and volume of water in the Provo River available for diversion by defendant at defendant's Olmsted dam is now and has been for several weeks past far less than the 229 cubic feet per second decreed to defendant in paragraph 33 of said Provo River decree, and that due to lack of water in the river at said Olmsted dam, defendant is receiving only approximately 170 cubic feet per second of water at its Olmsted dam as aforesaid. Plaintiff further alleges that all "Class A" users of water are at the present time restricted to approximately 65 - 70 percent of the amount of their decreed rights due to lack of sufficient water in the river to supply "Class A" rights in full.

27.

Defendant further alleges, on information and belief, that said Commissioner, T. F. Wentz, is administering, delivering and handling the Ontario waters and released storage waters herein referred to in the same way and by the same methods that said Commissioner has used for more than 20 years last past and ever since said Provo River decree was made and entered in 1921; and that if petitioner is not receiving the amount of water at Heiselt's dam to which petitioner feels itself entitled, the same is not due to any act of said Commissioner or to any deductions made from petitioner's released waters by said Commissioner, but is due to losses from seepage and evaporation as hereinabove alleged and set forth.

WHEREFORE, this defendant, Utah Power & Light Company, prays that the petition herein be dismissed and that the order to show cause heretofore issued be vacated, and that said Commissioner T. F. Wentz be released therefrom; and that this Court enter its order herein approving the acts and methods of said Commissioner in administering and delivering Ontario and storage waters, and requiring that said waters "bear each its respective loss by evaporation and seepage" as provided and required in said Provo River decree; and that this Court determine or require said Commissioner

to determine the quantity of loss of said waters by evaporation and seepage in accordance with paragraph 117 of said Provo River decree, and order said Commissioner to deliver to petitioner herein at its Heiselt dam only a quantity and volume of water equal to the quantity and volume of petitioner's released storage waters less all actual and occurring losses from evaporation and storage.

Geo R Carey

A. C. Inman

Attorneys for Utah Power & Light Co.
P.O. Address:

612 Kearns Building,
Salt Lake City, Utah.

STATE OF UTAH)
COUNTY OF SALT LAKE) ss

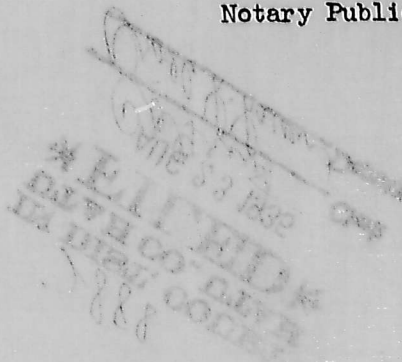
A. C. **INMAN**, being first duly sworn, deposes and says: That he is one of the Attorneys for Utah Power & Light Company, and makes this verification for and on behalf of said Company; that he has read the above answer, knows the contents thereof and the same is true, except as to matters therein stated on information and belief and as to such matters he believes it to be true; that he makes this verification for said Utah Power & Light Company for the reason that no officer or agent of said Utah Power & Light Company entitled to verify documents in legal proceedings, resides in Utah County in which the above action is pending, and for the further reason that ~~the~~ the matters and facts in said answer alleged are within the knowledge of this affiant.

A. C. Inman

Subscribed and sworn to before me this 22 day of Aug., 1935.

Charlotte Cummings

Notary Public residing at Salt Lake City, Utah



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IN DIST. COURT
UTAH CO. UTAH
FILED

AUG 23 1935
Clerk
Deputy

Colbert
Orrell S. Hansen